

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO
DELACRUZ,

Defendant and Appellant.

2d Crim. No. B285716
(Super. Ct. No. 2016044157)
(Ventura County)

ORDER MODIFYING
OPINION AND DENYING
REHEARING
[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on March 12, 2019, be modified as follows:

On pages 10-11, the paragraph under the heading DISPOSITION is deleted and the following paragraph is inserted in its place:

The judgment is affirmed. The case is remanded with directions to the superior court to decide whether it will exercise its newfound discretion to strike the prior serious felony enhancement under Penal Code sections 667, subdivision (a) and 1385.

There is a change in the judgment.

Appellant's petition for rehearing is denied.

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Marco Antonio Delacruz appeals a judgment following his conviction for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ with a finding that he personally inflicted great bodily injury (§ 12022.7, subd. (a)) (count 1) and disturbing the peace in a public place by fighting or challenging another person to a fight (§ 415, subd. (1)) (counts 2 through 4). In a “special finding verdict,” the jury found in 2012 Delacruz was convicted of street terrorism (§ 186.22, subd. (a)), a felony, and possession of a

¹ All statutory references are to the Penal Code.

firearm by a felon (§ 29800, subd. (a)(1)), a felony, and he “did not remain free of prison custody for a period of five years.” Delacruz fell within the purview of the three strikes law. The trial court sentenced him to an aggregate prison term of 16 years.

We conclude, among other things, that: 1) substantial evidence supports the jury’s finding that Delacruz did not act in self-defense or in defense of others; and 2) the trial court did not abuse its discretion by denying Delacruz’s “*Romero* motion” to strike his 2012 prior strike conviction or by imposing an upper term sentence for count 1.

But the recent passage of Senate Bill No. 1393 requires us to remand for resentencing. We affirm and remand with directions.

FACTS

On December 10, 2016, Anisurham Shahnawaz attended evening services at a mosque in Simi Valley, California. Around 11:00 p.m., John Matteson came to the mosque and asked if he could use the restroom. Matteson was intoxicated. Shahnawaz told him, “No, I’m sorry, we’re closed. You cannot use the restroom.” Matteson responded, “[S]o what kind of fucking place doesn’t have a restroom?” Matteson slammed the door and walked outside. Approximately 20 to 25 worshippers were outside the mosque wearing “traditional attire.”

Shahnawaz walked outside the mosque. Matteson was outside with Delacruz. Sahibzada Akhtar, the mosque’s Imam, was also outside the mosque. Matteson began screaming at the Imam and “demanding to use the restroom.” The Imam calmly told Matteson he could not use it because the mosque was closed. Matteson said, “You fucking Muslims. You guys need to leave the country. We are going to kill all of you.”

Delacruz began “arguing” with the worshippers. He said, “[W]hat kind of fucking place is this where we can’t use the restroom. You fucking Muslims are always causing trouble.”

Shahnawaz walked near the Imam to protect him. He believed Matteson was going to attack the Imam. Matteson punched Shahnawaz “on the forehead.” Shahnawaz “raised one fist in the air,” made a “punching motion,” and pushed Matteson away.

Matteson “charged at” Shahnawaz, swinging his fist. Shahnawaz testified he grabbed Matteson around the neck “to stop [him]” from “swinging at me.” Both men fell to the ground. Shahnawaz saw Delacruz approaching and he felt kicks and punches that were not being inflicted by Matteson.

Shahnawaz got “back up” on his feet. Matteson and Delacruz walked away “towards the right side of the entrance of the mosque.” The worshippers screamed at them “to leave and not cause any more problems.” The worshippers were unarmed and they did not attempt “to physically attack” Matteson or Delacruz.

Matteson and Delacruz “charged back” and threw “five to seven” bottles containing alcohol at the worshippers’ feet. The bottles broke and hit some of the worshippers. Matteson said, “[W]e are going to kill you guys before we leave and we are not going anywhere until we make sure we kill you guys.”

Shahnawaz testified, “[T]hey came at us again but this time there was no physical altercation.” Some of the worshippers were using their hands to push Matteson and Delacruz away and telling them “to leave before the cops come over here.” Shahnawaz testified, “I did not have any physical contact with [Matteson or Delacruz].” This encounter lasted 35 to 40 seconds. Matteson and Delacruz left “the scene.”

Shahnawaz turned around and walked back to the mosque. Mohammed Malik testified Delacruz approached Shahnawaz from behind and stabbed him. Shahnawaz testified he that when he lifted his shirt and saw “blood pouring out,” he realized he “was stabbed” on the “right side of the abdomen.” He received medical treatment at the Los Robles Trauma Center. He had a “drainpipe” attached to the wound to prevent infection. His stitches were removed two weeks later and the drainpipe was removed a week after that. He has continuing side effects as a result of the knife wound. He said, “I have severe pain if I sit for more than an hour. . . . I have to continuously take pain medicine.”

In the defense case, Delacruz testified Matteson is his neighbor. On the night in question, he and Matteson were intoxicated. They went to the mosque and Matteson asked to use the bathroom. They said that “they [did not] have a bathroom.” Delacruz testified, “I never got upset.” He did not make “ethnic slurs to anybody at the mosque.”

Shahnawaz started “grabbing” and “attacking” Matteson. Delacruz testified he stabbed Shahnawaz “because of [his] friend’s safety.” Delacruz fled from the scene. He did not wait for the police to arrive because they would not “believe” him. He subsequently lied to the police about his whereabouts at the time of the incident because he “was afraid of going back to jail for something that [he felt] like it was self-defense.”

DISCUSSION

Substantial Evidence for the Jury’s Finding on Self-Defense

Delacruz contends there was insufficient evidence to support the jury’s finding that he did not act in self-defense or in defense of others. He claims the convictions for counts 1 through 4 must be reversed. We disagree.

approached Shahnawaz from behind and stabbed him. He said Shahnawaz was walking back toward the mosque when this occurred. At this time the worshippers thought “the altercation had ended.” Shahnawaz testified he was “walking back toward the direction of the mosque” when he “realized [he] was stabbed.” He was unarmed.

Delacruz claims Shahnawaz was stabbed in an earlier incident where Shahnawaz was struggling with Matteson. Delacruz testified Shahnawaz was “attacking” Matteson at the time of the stabbing.

But the issue is not whether some evidence or inferences support Delacruz, it is whether substantial evidence supports the judgment. We do not resolve evidentiary conflicts. (*People v. Yeoman, supra*, 31 Cal.4th at p. 128.) This conflict in the evidence was resolved against Delacruz by the jury. (*People v. Garcia, supra*, 275 Cal.App.2d at p. 522 [the trier of fact is “not required” to “accept defendant’s version of what occurred”].) “ ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ ” (*Id.* at p. 521.)

From Malik’s and Shahnawaz’s testimony, the jury could reasonably find the stabbing did not occur during the prior struggle. Shahnawaz testified he had no further “physical contact with” either Matteson or Delacruz following the incident where Matteson and Delacruz threw bottles at the worshippers. He said the worshipers in front of the mosque were “screaming at [Matteson and Delacruz] to leave and not cause any more problems.” But the worshippers were not “attempting to physically attack [Matteson and Delacruz],” and were not armed. Malik’s testimony shows the knife attack was not in response to

any imminent danger or threat. The jury could reasonably find 1) Shahnawaz was not armed; 2) he had neither threatened nor confronted Matteson or Delacruz at the time of the stabbing; and 3) the use of the knife was unreasonable and unjustified.

Delacruz testified that he stabbed Shahnawaz “because of [his] friend’s safety.” But the jury could reasonably find Delacruz was not credible. He fled before the police arrived. He admitted he lied to the police about his whereabouts at the time of the incident. This showed his consciousness of guilt.

Delacruz contends there was no substantial evidence to support the finding that he was not acting in self-defense on counts 2 through 4. But the People presented evidence showing Delacruz initiated the conduct constituting the offenses of disturbing the peace and his acts were not in response to an imminent threat or motivated by any reasonable fear. The jury found Shahnawaz’s testimony about Delacruz’s conduct to be credible.

The Motion to Strike Delacruz’s Prior Conviction

Delacruz contends the trial court erred in not granting his motion to strike his prior “strike offense for street terrorism (§ 186.22, subd. (a)) in 2012” pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

In ruling on “whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law,” the trial court considers the “nature and circumstances of [the defendant’s] present felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) It also considers the defendant’s “background, character, and prospects” to determine if the defendant is “outside of the scheme’s spirit.” (*Ibid.*)

Delacruz notes that he had “one prior strike conviction for street terrorism (§ 186.22, subd. (a))” in 2012, which is “a strike

offense.” He claims, however, that the trial court did not give proper consideration to the *Williams* factors in deciding not to grant his request to strike this strike offense.

Delacruz filed a motion to strike priors (*Romero* motion), claiming “dismissing [his 2012 street terrorism conviction] would further the interests of justice.” The trial court denied his *Romero* motion, stating it had considered “all of the usual factors on a *Romero* motion,” the “probation report,” and “his criminal history.” The court, quoting from the probation report, said that Delacruz “engaged in violent conduct,” his “prior convictions and/or sustained petitions are numerous,” and his “performance on either probation, parole or both was unsatisfactory.” “‘At the age of 27, [Delacruz] has amassed a lengthy criminal record. He has been supervised on juvenile probation, formal probation and parole supervision. [Delacruz], however, fails to take advantage of the services afforded to him and continues to make poor choices.’” Delacruz has not shown an abuse of discretion.

Imposing the Upper Term for Count 1

The trial court selected the upper term of four years for the count 1 assault conviction. (§ 245, subd. (a).) It doubled it to eight years because of the prior strike; added a consecutive three years for the section 12022.7, subdivision (a) enhancement; and added a consecutive five years under section 667, subdivision (a) for an aggregate 16-year sentence.

Delacruz contends the trial court erred by imposing the upper term of four years on count 1. He claims it should have 1) selected the *low term of two years* for count 1 and “doubled” it to “four years because of the strike prior”; and 2) added “terms of three years for the great bodily injury enhancement and five years for the prior serious felony conviction (§ 667, subd. (a)),” which would yield a 12-year sentence.

The trial court has “broad discretion” in making sentencing choices. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) An appellate court reviews its sentencing decision for “abuse of discretion.” (*Ibid.*) A single aggravating circumstance is sufficient “to make the defendant eligible for the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813.)

In imposing the upper term, the trial court said it considered Delacruz’s “criminal history and the seriousness of the stabbing wound to the victim.” Shahnawaz’s wound required surgery, and he testified he still feels pain as a result of it. The court found there were “no circumstances in mitigation.” It considered Delacruz’s unsatisfactory performance on probation and parole and his extensive record. Delacruz has not shown an abuse of discretion.

Senate Bill No. 1393

In a supplemental opening brief, Delacruz claims the recent passage of Senate Bill No. 1393 requires a remand for resentencing.

The trial court imposed a consecutive five years for Delacruz’s prior serious felony conviction under section 667, subdivision (a). At the time of sentencing, the court was required to impose this enhancement. (§§ 667, subd. (a), 1385, subd. (b).)

On September 30, 2018, the Governor signed Senate Bill No. 1393, which amends sections 667 and 1385. (Stats. 2018, 2017-2018 Reg. Sess., ch. 1013, §§ 1-2.) These amendments eliminate the mandatory imposition of this enhancement. They “allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

The Legislative Counsel’s Digest on Senate Bill No. 1393 states, in relevant part, “Existing law requires the court, when

imposing a sentence for a serious felony, in addition and consecutive to the term imposed for that serious felony, to impose a 5-year enhancement for each prior conviction of a serious felony. Existing law generally authorizes a judge, in the interests of justice, to order an action dismissed, but precludes a judge from striking any prior serious felony conviction in connection with imposition of the 5-year enhancement. [¶] This bill *would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement described above . . .*” (Stats. 2018, *supra*, ch. 1013, No. 9 West’s Cal. Legis. Service, p. 6672, italics added.)

Delacruz contends “[his] matter should be remanded to the trial court for resentencing under the amended version of sections 667, subdivision (a)(1) and 1385, subdivision (b), which give the trial court discretion to dismiss the enhancement in furtherance of justice.”

Delacruz correctly notes that, because his judgment is not final, the new legislation applies to this case. “A criminal statute is amended after the prohibited act is committed, but before final judgment, by mitigating the punishment. What statute prevails as to the punishment—the one in effect when the act was committed or the amendatory act? . . . We hold that in such situations the punishment provided by the amendatory act should be imposed.” (*In re Estrada* (1965) 63 Cal.2d 740, 742.) Because Delacruz’s “judgment of conviction” will not be “final on January 1, 2019,” Senate Bill No. 1393 applies “retroactively to defendant’s judgment.” (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973.)

DISPOSITION

The judgment is affirmed. The case is remanded with directions to the superior court to decide whether it will exercise

its newfound discretion to strike the prior prison term enhancement pursuant to Senate Bill No. 1393. At the remand hearing, Delacruz has the right to assistance of counsel and, unless he chooses to waive it, the right to be present. If the court exercises this discretion, Delacruz shall be resentenced and the abstract of judgment amended.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of Ventura

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